FOURTH DIVISION
AUGUST 21, 1997

No. 1-96-1064

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

v.

ELECTRONIC PLATING COMPANY, ROBERT PORCELLI, and HARSHAD PATEL,

Defendants-Appellees.

Appeal from the Circuit Court of Cook County
No. 94-CR-10434
Honorable Eugene Campion, Judge Presiding.

MODIFIED ON DENIAL OF REHEARING

JUSTICE CERDA delivered the opinion of the court:

Defendants, Electronic-Plating Company (EPC) and two company officials, Robert Porcelli and Harshad Patel, were indicted on 22 counts of introducing contaminants into a sewage works from a non-domestic source (415 ILCS 5/12(h); 5/44 (j)(1)(H) (West 1994)), one count of unauthorized use of hazardous waste (415 ILCS 5/44 (d)(1)(A) (West 1994); 35 Ill. Adm. Code, §722.134)), and one count of conspiracy (720 ILCS 5/8-2; 415 ILCS 5/12(h) (West 1994)). Prior to trial, defendants filed a motion to suppress evidence, contending that the evidence recovered by the Metropolitan Water Reclamation District (District) agents had been illegally obtained in violation of the U.S. Constitution's fourth amendment.

Following a hearing, the trial court granted the motion to suppress. On appeal, the State asserts that the trial court erred because (1) EPC lacked a reasonable expectation of privacy in their sewer connection; (2) EPC lacked a possessory interest in the wastewaters that were being irretrievably discharged from its plant; and (3) the search conducted was authorized by a valid statute. For the following reasons, we reverse and remand.

The issue in this case is whether the District conducted a search and seizure under the fourth amendment when it obtained samples of the wastewaters EPC had flushed out into a pipe that was connected to the District's sewerage system.

On June 26, 1992, the District received an anonymous tip from an alleged ex-EPC employee that EPC had installed and was operating an underground by-pass of its pretreatment facility. The informant also sent the District a sketch showing the location of the alleged bypass.

On September 26, 1992, James Waclawik, a pollution control officer, went to EPC pursuant to instructions from District supervisor Allen Giedraitis to investigate the alleged by-pass. Previously, the 1-A sampling station had been set up as EPC's designated sampling point pursuant to the District's statutory authority. Station 1-A was physically located underneath a manhole in a pipe under the concrete floor of EPC's building. The District has a user charge sampling program, which verifies the strength and volume of sewage, industrial waste, and other wastes generated by EPC. Because Waclawik was aware that the 1-A sampling station may not have been providing an accurate sample of the dis-

charge from EPC, he went to EPC to determine whether a by-pass had been put in the line to avoid the District's official sampling point. Typically, the District inspected every company that is regulated under the Sewage and Water Control Ordinance, including EPC, at least once a week.

On September 26, 1992, Waclawik knocked on the side door and was admitted into the premises by an EPC employee. When Waclawik entered the plant, he was directed to the area of the treatment system. Waclawik proceeded to a manhole, station 1-A, which was the sampling point specifically designated by EPC for inspections. There, he discovered a suspicious discolored discharge, so he began to investigate. He encountered Jerry Steward, EPC's maintenance supervisor, who told him that the reason for the discolored discharge was that a valve had been left open by an employee. Waclawik then traced the discolored discharge beyond station 1-A.

After the inspection, Waclawik reported his findings to Giedraitis and prepared a report. He returned to the EPC plant on October 27, 1992, to install a surreptitious probe from station 1A. When he entered the plant, he told company personnel that he needed to service the automatic sampling equipment at station 1A. He did not request permission from EPC personnel to install the second probe because he did not want them to know he would be sending a surreptitious probe 24 feet down the sewer line from station 1A. After he shut down the automatic samplers at station 1A and obtained 99 samples from the surreptitious probe, he noticed that the samples were obviously different than those taken from the

immediate area of station 1A. They appeared to violate the District's Sewage and Waste Control Ordinance.

Between October 27, 1992, and November 12, 1992, Waclawik and other District personnel returned to the EPC site numerous times to obtain samples from station 1A's surreptitious probe. Each time, Waclawik was in full District uniform. Neither the existence of the 24 foot surreptitious probe nor the real reason for its presence was ever revealed to EPC personnel. He took steps to allay EPC's suspicions, including programming the automatic sampler for an anticipated holiday schedule and stopping his activities when he became aware of being followed by an EPC employee. Occasionally, his activities were interrupted by the unexpected arrival of EPC employees. Neither Waclawik nor the other District employees sought or obtained search warrants for any of the visits.

Waclawik submitted the samples for analysis and reported his findings to his superiors. Giedraitis directed that EPC not be notified of the covert investigation. Waclawik and other District employees returned to EPC 10 times over the next two weeks to gather more samples. On November 10, 1992, a search warrant was issued on the basis of Waclawik's affidavit.

The trial court granted EPC's motion to suppress. In its February 23, 1996, written order and opinion, the court found that the State's argument, that EPC did not have a reasonable expectation of privacy in the wastewaters, was irrelevant because the minimized privacy interests of commercial establishments are taken into account in the administrative search exception to the warrant clause. The court ruled that EPC had a suffi-

cient expectation of privacy to trigger the protection of the fourth amendment.

The court also determined that the District's warrantless search did not fall under any of the recognized exceptions of the warrant requirement. The court decided that the Colonnade-Biswell doctrine, which permits warrantless administrative searches of pervasively regulated industries, did not apply because the electronic plating industry is not pervasively regulated. In addition, the court held that the ordinance permitting the inspections does not authorize or justify warrantless searches because it does not specifically limit the time, place, and scope of the administrative searches. Finally, the court stated that the District acted unreasonably by using its administrative authority to conduct a criminal investigation. The court did not find the ordinance unconstitutional.

The issue is whether the motion to suppress was improper. The facts and credibility of the witnesses are not at issue because the relevant evidence of what actually occurred was not disputed. Therefore, it is a question of law whether a motion to suppress should be granted, and this court will consider the question *de novo*. *People v. Abney*, 81 Ill. 2d 159, 168, 407 N.E.2d 543 (1980); *People v. Patterson*, 267 Ill. App. 3d 933, 940, 642 N.E.2d 866 (1994).

The record shows that there is no dispute about the nature and purpose of the District's inspections. While conducting routine maintenance of the automatic sampler installed at station 1A, the District was at the same time investigating anonymous criminal allegations by collecting evidence from a different sampling point,

which was intentionally concealed by the District. Because the samples were taken automatically in small increments, the District was able to collect samples 24 hours a day.

We must first determine whether the District's actions constituted a search and seizure under the fourth amendment. If a fourth amendment search and seizure occurred, a warrant was required unless an exception applies. If this case involves a closely regulated industry, the warrantless inspection would be reasonable under the administrative inspection exception if three criteria were met: (1) the regulation authorizing the inspection must be written pursuant to a substantial government interest; (2) the warrantless inspection must be necessary to further the regulatory scheme; and (3) the statute must provide for a sufficiently regular and certain application as an adequate substitute for a warrant. *New York v. Burger*, 482 U.S. 691, 701-02, 96 L. Ed. 2d 601, 613-14, 107 S. Ct. 2636, 2643-44 (1987).

The State asserts that we do not have to consider the exception because the fourth amendment does not apply. The State contends that EPC did not have a reasonable expectation of privacy in the sewer connection searched or a possessory interest in the wastewaters seized. The State characterizes the premises searched as the connection to the public sewer system under EPC's building, not the building itself. To support its argument, the State relies on *Grigoleit, Inc. v. Board of Trustees of Sanitary Dist.*, 233 Ill. App. 3d 606, 611, 599 N.E.2d 51 (1992), but that case was expressly not a fourth amendment case because there was no actual search. The State also argues that no seizure occurred pursuant to

the fourth amendment because the wastewaters seized had been flushed into the public sewer system.

The fourth amendment, which protects against unreasonable searches and seizures, applies to commercial premises. *Burger*, 482 U.S. at 699, 96 L. Ed. 2d at 612, 107 S. Ct. at 2642; *U.S. v. Jacobsen*, 466 U.S. 109, 113, 80 L. Ed. 2d 85, 94, 104 S. Ct. 1652, 1656 (1984); *People v. Janis*, 139 Ill. 2d 300, 109, 565 N.E.2d 633 (1990). A fourth amendment search occurs when an expectation of privacy that society recognizes as reasonable is infringed. *Jacobsen*, 466 U.S. at 113, 80 L. Ed. 2d at 94, 104 S. Ct. at 1656. Although there is no dispute that EPC had a subjective expectation of privacy in its sewer connection, that does not give rise to fourth amendment protection unless society is prepared to recognize that expectation as objectively reasonable. *California v Greenwood*, 486 U.S. 35, 39-40, 100 L. Ed. 2d 30, 36, 108 S. Ct. 1625, 1628 (1988); *Jacobsen*, 466 U.S. at 113, 80 L. Ed. 2d at 94, 104 S. Ct. at 1656; *Janis*, 139 Ill. 2d at 309. Whether a search is reasonable depends on the facts and circumstances giving rise to the search as well as the nature of the search itself. *King v. Ryan*, 153 Ill. 2d 449, 457, 607 N.E.2d 1154 (1992). If the inspection does not intrude on a legitimate expectation of privacy, there is no search subject to a search warrant. *Illinois v. Andreas*, 462 U.S. 765, 771, 77 L. Ed. 2d 1003, 1010, 103 S. Ct. 3319, 3324 (1983). The determination must be made by balancing the intrusion on the fourth amendment privacy interests against the promotion of legitimate governmental interests. *Delaware v. Prouse*, 440 U.S. 648, 654, 59 L. Ed. 2d 660, 667-68, 99 S. Ct. 1391, 1396 (1979).

In this case, we do not think that EPC had an objectively reasonable expectation of privacy in the wastewaters contained in the sewer connection that was searched. Therefore, there was no search subject to a search warrant. *Andreas*, 462 U.S. at 771, 77 L. Ed. 2d at 1010, 103 S. Ct. at 3324. Not only does the owner of commercial premises in a closely regulated industry have a reduced expectation of privacy (*Burger*, 482 U.S. at 702, 96 L. Ed. 2d at 613, 107 S. Ct. at 2643), but there is a strong public policy against water pollution. 70 ILCS 405/2(c) (West 1994).

A system for waste disposal and sewage treatment has long been regarded as necessary for public health. *Chicago Allis Mfg. Corp. v. Metropolitan Sanitary Dist.*, 52 Ill. 2d 320, 324, 288 N.E.2d 436 (1972). Industrial wastes impose a special burden on the District's facilities in comparison with residential wastes, and the disposal of waste obviously poses a potential hazard to public health. *Chicago Allis Mfg. Corp.*, 52 Ill. 2d at 324. The provisions of the Sewage and Waste Control Ordinance are designed to deter anyone from introducing contaminants into the public sewer system by providing a system for monitoring the user's waste discharges.

When EPC discharges industrial wastewaters into the public sewer system, it is subject to the provisions of the Metropolitan Water Reclamation District Act (70 ILCS 2605/1 *et seq.* (West 1994)) and the Metropolitan Water Reclamation District of Greater Chicago Sewage and Waste Control Ordinance. Article I of the ordinance provides that its purpose is "the protection of the public health and safety," which is carried out by "abating and preventing pollution through the regulation and control of the quantity and quality of sewage, industrial wastes,

and other wastes admitted or discharged into the sewerage treatment facilities and waters under the District's jurisdiction."

EPC was entitled to use the public sewer system on a permissive basis only. As a general rule, a permit to connect to public sewers is in the nature of a license only and does not create a vested right in such a connection. *LaSalle National Bank & Trust Co. v. City of Chicago*, 128 Ill. App. 3d 656, 665, 470 N.E.2d 1239 (1984). Permission to use the public sewer system was conditioned on compliance with the Act and ordinance, which requires EPC to provide the District with sampling stations. Although the District sampled wastewaters 24 feet from station 1A, a location farther than the immediate area of the designated sampling station, station 1A, we do not find the additional sampling to be unreasonable. EPC was required to allow the District to take samples from a designated control manhole during reasonable hours, and the District took samples from the designated control manhole using a probe 24 feet downstream inserted from station 1A in the same sewer line as station 1A.

Given the purpose of the ordinance, EPC did not have an objectively reasonable expectation of privacy in the sewer connection below its property. One who discharges waste into the public sewer system cannot have an objectively reasonable expectation of privacy in the pipe through which those discharges flow. Wastewater discharges by EPC "constitute a series of acts performed upon land in which it possesses no estate or interest." *Grigoleit, Inc. v. Board of Trustees*, 233 Ill. App. 3d 606, 612. To be permitted to use the public sewer system, the user must allow the District to periodically sample the

wastewater discharges emanating from its premises. The District acted in accordance with the purposes of the ordinance. To enforce the purposes of the ordinance, the District must be allowed to monitor a user's wastewater discharges from a point on the user's premises before those discharges commingle with the discharges of other users. Subsections 1 and 2, Article IV, MWRD Sewage and Waste Control Ordinance.

The sewer connection in this case differs from the search of the dumpster in *Commonwealth v. Krisco Corp.*, 421 Mass. 37, 653 N.E.2d 579 (1995), one of the cases on which EPC relies. In *Krisco Corp.*, the dumpster was located in an alley adjacent to the business behind closed gates and was intended for the exclusive use of the business. *Krisco Corp.*, 421 Mass. 37. While the expectation of privacy in the dumpster was objectively reasonable by society's standards, EPC's expectation of privacy in the sewer connection was not objectively reasonable. If EPC's pipe had never been connected to the public sewer system, EPC would have had an objectively reasonable expectation of privacy in the pipe and its contents. However, once EPC's pipe was connected to the District's public sewer system, any expectation of Privacy in the wastewater discharge contained in that pipe became objectively unreasonable. The wastewaters flushed into the pipe became a part of the public sewer system.

We also find that a fourth amendment seizure did not occur because there was no meaningful interference with EPC's possessory interests in the wastewaters seized. *Soldal v. Cook County*, 506 U.S. 56, 61, 121 L. Ed. 2d 450, 458, 113 S. Ct. 538, 543 (1992). EPC did not have a possessory interest in the wastewaters that was irre-

trievably discharged into the public sewer system. Once the wastewaters entered the sewer pipe, it no longer was possessed by EPC. The wastewaters being discharged through the sewer pipes can be compared to the trash left for collection in *Greenwood*, 486 U.S. at 39-40, 100 L. Ed. 2d at 36-37, 108 S. Ct. at 1628-29. Although the wastewaters was not visible to the public in the same way as the trash was, EPC sufficiently exposed the wastewaters to the public to defeat its claim to fourth amendment protection. *Greenwood*, 486 U.S. at 40, 100 L. Ed. 2d at 36, 108 S. Ct. at 1628. There is no seizure to invoke constitutional protection if one voluntarily transfers any possessory interest he may have had in the property. *Maryland v. Macon*, 472 U.S. 463, 469, 105 S. Ct. 2778, 86 L.Ed. 2d 370 (1985).

As stated in *Greenwood*, "an expectation of privacy does not give rise to Fourth Amendment protection unless society is prepared to accept that expectation as objectively reasonable." *Greenwood*, 486 U.S. at 39-40, 100 L.E.2d at 26, 108 S. Ct. at 1628. In *Greenwood*, the court concluded that the defendants exposed their garbage to the public sufficiently to defeat their claim to fourth amendment protection. The *Greenwood* court reasoned that defendants, "having deposited their garbage 'in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it,' [cite omitted] respondents could have no reasonable expectation of privacy in the inculpatory items that they discarded." *Greenwood*, 486 U.S. at 40-41, 100, L. Ed. 2d at 36-37, 108 S. Ct. at 1628-29.

Just as the plastic garbage bags left on the side of a public street were readily accessible to members of the

public, the wastewaters were readily accessible to the public sewer system as soon as they were discharged. Having deposited the wastewaters in an area particularly suited for public inspection for the express purpose of having strangers take it, EPC could have had no reasonable expectation of privacy in the wastewaters that it discarded. Greenwood, 486 U.S. at 40-41, 100 L. Ed. 2d at 36-37, 108 S. Ct. at 1628-29. As a result, the District's collection of the wastewaters was not a seizure for the purposes of the fourth amendment.

Because there was no fourth amendment search or seizure, we need not consider the administrative inspection exception of the warrant clause. Accordingly, we reverse the circuit court's judgment and remand this cause for further proceedings.

Reversed and remanded.

McNamara, J., and Burke, J., concur.

[Filed February 23, 1996]

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,	)	
v.	)	No. 94 CR 19434 95 CR 579
ELECTRONIC PLATING COMPANY, ROBERT PORCELLI, and HASHAD PATEL, Defendants.	)	(Consolidated)

MEMORANDUM OPINION AND ORDER

Defendants have moved this court to suppress evidence seized pursuant to a purportedly illegal search. Defendants are charged with the illegal discharge of industrial contaminants into the sanitary sewer system. The facts are largely undisputed and they, along with the testimony elicited at the hearing on the Motion to Suppress, are fairly summarized as follows.

In June, 1992, the Metropolitan Water Reclamation District ("MWRD") received a complaint from an "informant" that defendant Electronic Plating Company ("EPC") had installed and was operating an underground bypass of its pretreatment facility. On or about September 26, 1992, James Waclawik, a pollution control officer with MWRD, went to the EPC facility in Cicero and, with the permission of EPC personnel, installed a dedicated automatic sampler into the sewer line. MWRD characterizes this installation as part of an MWRD program to install such samplers at various sites

throughout the district, combined with an annual inspection conducted pursuant to the District's Sewage and Waste Control Ordinance. Waclawik testified that all plating companies in the district were subject to such sampling and inspection on an annual basis pursuant to the Ordinance.

On or about October 27, 1992, Waclawik installed what MWRD terms a "surreptitious probe" at a second location, further down the sewer line. This probe effectively extended the original sampler 27 feet. The purpose of the second probe was undisputedly to obtain samples from a second location without the knowledge of EPC personnel. Waclawik did not request permission of EPC personnel to install this second probe and, in fact, "did not wish them to know he was sampling from that location." He did not seek or obtain a search warrant.

Between October 27 and November 12, 1992, Waclawik and other MWRD personnel returned to the EPC site numerous times and obtained samples from the second, "extension" probe, never revealing to EPC personnel either the existence of the probe or the true purpose of their presence on the premises. Neither Waclawik nor the other MWRD employees sought or obtained search warrants for these visits to EPC. Waclawik testified that his activities were occasionally interrupted by the unexpected (and undesired) arrival of EPC employees. He further testified that he took steps to allay EPC's suspicions, such as programming the automatic sampler for anticipated weekend schedules, that he ceased his activities at one point when he became aware that he was being "followed" by an EPC

employee, and that he concealed from EPC his attempts to verify the allegations of the informant's complaint.

After MWRD had gathered "secret" samples for approximately two weeks, it delivered to the State's Attorney's office the results of its collection of information. The State's Attorney then convened grand jury proceedings and obtained and executed a search warrant, in that order. As a result of the grand jury proceedings, defendants were indicted for "Unauthorized use of Hazardous Waste." The evidence presented to the grand jury consisted primarily of the samples obtained from the second, surreptitious probe at the EPC plant.

DEFENDANTS' MOTION TO SUPPRESS

The court has previously denied defendants' Motion to Dismiss Indictments in their Entirety. The arguments made in defendants' Memorandum of Law in support of their dual motion apply equally to the suppression issue and, therefore, will be addressed here. The thrust of both motions is that the warrantless search(es) performed by the MWRD violate the Fourth Amendment because none of the recognized exceptions to the search warrant requirement apply.

Defendants argue that the *Colonnade-Biswell* Doctrine permits warrantless administrative searches only in limited circumstances. Pursuant to that doctrine, defendants maintain, a warrant is not needed to perform an administrative search when the party being searched is a member of a closely regulated industry and when the legislation relied upon to authorize the search is so highly specific and regular in application that it provides an "adequate substitute for a search warrant."

Neither of those conditions, defendants maintain, is met here.

Next, defendants argue that a governmental body is not permitted to use even an otherwise permissible administrative search as a "ruse" to investigate or uncover criminal conduct. Defendants cite *New York v. deWit*, No. 88-38 (N.Y. County Ct., Feb. 16, 1989) as persuasive authority on this point. Defendants argue that the New York court in *deWit*, under facts strikingly similar to those here, suppressed evidence seized during a warrantless administrative search (and the fruits thereof) *because* the search was based on suspicion of criminal activity. They also cite *People v. Bessler*, 191 Ill. App. 3d 374, 548 N.E.2d 52 (2d Dist. 1989), in which a municipal housing inspector and a police officer, under the guise of performing a routine inspection of property, forcibly entered a padlocked garage in search of evidence to corroborate a tip of illegal activity. Upon finding such evidence, the officer obtained and executed a search warrant. The Appellate Court reversed the trial court's denial of defendant's motion to suppress, holding that the initial search which formed the basis for the search warrant was unlawful; the initial, purportedly administrative search required a search warrant.

THE STATE'S RESPONSE

The state offers three legal responses to the defendants' motion. First, it argues that, under *Illinois v. Krull*, 480 U.S. 340 (1987), evidence obtained by police officers acting in "objectively reasonable reliance" upon laws authorizing warrantless searches is not subject to the exclusionary rule even if such law is found unconsti-

tutional. The state contends that Waclawik acted in objectively reasonable reliance upon the MWRD's Sewage and Waste Control Ordinance and its enabling legislation, both of which are "facially valid" and permit warrantless administrative searches such as were undertaken here.

Second, the state argues that the warrantless searches did not violate a reasonable expectation of privacy on the part of the defendants. Citing *Grigioleit v. Board of Trustees*, 233 Ill. App. 3d 606, 599 N.E.2d 51 (4th Dist. 1992), the state argues that because EPC was a mere licensee with respect to the sewer system, it had no constitutionally protected interest in the property. In addition, the state contends that defendants "abandoned" the waste which was the subject of the warrantless search and, thus, relinquished any reasonable expectation of privacy in that material.

The state makes an additional, separate argument as to defendants Porcelli and Patel. It argues that these individual defendants have not demonstrated any personal proprietary interest in the property searched or seized. Therefore, the state claims, because neither Porcelli nor Patel have shown any violation of their Fourth Amendment rights, the evidence so seized should not be suppressed as to them.

Third, the state argues that the defendants consented, at least impliedly, to the searches performed by MWRD personnel. The state bases its implied consent theory on defendants' purported knowledge of their right to object to Waclawik's presence and their failure to so object to installation of the extension probe. The state argues that under *See v. City of Seattle*, 387 U.S. 541 (1967),

there is no requirement that an administrative warrant be obtained until an objection is made to the lack of a warrant.

DISCUSSION

The Fourth Amendment prohibition against unlawful searches and seizures requires a search warrant for administrative searches. *New York v. Burger*, 482 U.S. 691 (1987); *Marshall v. Barlow's*, 436 U.S. 307 (1978). The U.S. Supreme Court has recognized and the Illinois and lower federal courts have interpreted, several exceptions to this general rule. *See, e.g., Colonnade Corp. v. U.S.*, 397 U.S. 72 (1970); *U.S. v. Biswell*, 406 U.S. 311 (1972); *People v. Madison*, 121 Ill. 2d 195, 520 N.E.2d 374 (1988); *Bionic Auto Parts & Sales v. Fahner*, 721 F. 2d 1072 (7th Cir. 1982). It is undisputed here that the MWRD conducted its search and seized evidence without a warrant. The issue, therefore, is whether its actions fall under any of the recognized exceptions to the warrant requirement. The court concludes they do not.

The primary exception to the warrant requirement, known as the Colonnade-Biswell Doctrine, permits warrantless administrative searches of pervasively regulated industries where 1) there is a "substantial government interest that informs the regulatory scheme pursuant to which the inspection is made," 2) the warrantless searches are "necessary to further the regulatory scheme", and 3) "the statute's inspection program, in terms of the certainty and regularity of its application, [provides] a constitutionally adequate substitute for a search warrant." *New York v. Burger*, 107 S. Ct. at 2644.

This exception is inapplicable to the instant case. The regulatory scheme suggested here as justification for warrantless searches does not purport to "pervasively regulate" the electronic plating industry. The regulatory schemes subject to Colonnade-Biswell analysis uniformly pertain to a particular type of business or industry. In *Colonnade*, for example, the Court found a long history of regulation of the liquor industry and corresponding authority of Alcohol, Tobacco, and Firearms agents to conduct inspections under "liquor laws". Likewise, in *U.S. v. Biswell*, the Gun Control Act of 1968 was found to be the regulatory scheme to which the firearms industry was subject. *See also, Donovan v. Dewy*, 452 U.S. 594 (1981) (Federal Mine Safety and Health Act of 1977 applicable to mine inspections); *Bionic Auto Parts and Sales, Inc. v. Fahner*, 721 F. 2d 1072 (7th Cir. 1983) (Illinois Vehicle Code as authorizing warrantless searches of business premises of automotive parts dealers, scrap processors, and parts rebuilders). The MWRD Sewage and Waste Control ordinance does not purport to effect a comprehensive statutory scheme tantamount to a substitute for a search warrant in this particular industry. Nor does the MWRD suggest an additional or alternative regulatory framework. The court, therefore, need not determine whether the Ordinance meets the Colonnade-Biswell exception to the warrant requirement.

Even if the Ordinance were found to be the sort of pervasive regulatory framework contemplated by the Doctrine, the provision of the Ordinance permitting inspections is not of the type which either authorizes or justifies warrantless searches in the circumstances of this case. As the Seventh Circuit observed in *Bionic*

Auto Parts, "Even in closely regulated industries, the inspection provisions still must be tailored to the state's proper objectives, and they must minimize the dangers inherent in the unbridled exercise of administrative discretion." 721 F. 2d at 1079. In that case, the court found constitutional that portion of the Illinois Vehicle Code authorizing warrantless administrative searches of automotive parts dealers, scrap processors, motor vehicle dealers, and others in related businesses. The court found that the statute and regulations promulgated thereunder limited the discretion of state officials sufficient to satisfy constitutional concerns. The statute "delineates specifically what is to be searched," "describes how searches are to be conducted," and limits the number of such inspections that may be conducted within a six-month period. *Id.*, at 1080. The Ordinance here provides no such limits and, in fact, does not by its terms authorize the sort of "inspection" conducted by the MWRD in this case. Section 3 of the Ordinance provides, in pertinent part, "Representatives of the District may, during reasonable hours of all working shifts of the person, enter upon the premises of each person subject to this Ordinance for the purpose of installing, maintaining and inspecting measurement or sampling devices or facilities, for conducting necessary measuring, gauging and sampling operations . . . to determine compliance with this Ordinance." Section 5 further provides "Any person subject to this Ordinance who has a history of bypass or access to premises violations of this Ordinance, or a history of discharge violations of this Ordinance, may be directed by the General superintendent to provide a means of unrestricted access, acceptable to the District, for the purpose of sampling at any control

manhole or sampling chamber required under Article IV." Neither of these provisions defines the time, place, manner or frequency of warrantless inspections, as does the Vehicle Code provision, nor do they contemplate warrantless searches for purposes other than determining compliance. The Ordinance does not authorize MWRD personnel to conduct "investigations" based on tips of illegal activity.

The second exception, urged by the State as applicable here, is the "good faith" exception enunciated in *U.S. v. Leon*, 468 U.S. 897 (1984) and expanded in *Illinois v. Krull*, 480 U.S. 340 (1987). The rationale of *Krull*, upon which the State primarily relies, is that: "Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written." *People v. Madison*, 121 Ill. 2d 195, 207 (7th Cir. 1988), quoting *Illinois v. Krull*, 480 U.S. at 349-50. The State's reliance on *Krull* is misplaced. The good faith exception exempts from the exclusionary rule evidence seized pursuant to a search undertaken in "good faith" reliance on a statute which is subsequently found unconstitutional. Any claim by the MWRD to have acted in "good faith" upon its own ordinance is belied by the surreptitious manner in which it conducted investigation.

Even if such good faith were reasonably imputed to Waclawik on behalf of the MWRD, the Ordinance itself

does not authorize such an investigation. The State's argument here mirrors the position rejected by the Illinois Supreme Court in *People v. Madison*. There, the State argued that an officer's subjective reliance on his own interpretation (or misinterpretation) of a statute should satisfy the good faith exception. The Supreme Court held, "the officer's good faith alone is not sufficient to validate the search and seizure; the officer must also be acting on the authority of a seemingly valid warrant or statute. Here, there is no such reliance, but quite the opposite." 121 Ill. 2d at 195.

The State's contentions and citations regarding the defendants' lack of an expectation of privacy in the waste disposed via the sewer system are largely irrelevant. The minimized protectible privacy interests of commercial establishments are taken into account in the jurisprudence regarding warrantless administrative searches. "An owner or operator of a business thus has an expectation of privacy in commercial property, which society is prepared to consider to be reasonable . . . An expectation of privacy in commercial premises, however, is different from, and indeed less than a similar expectation in an individual's home." *New York v. Burger*, 107 S. Ct. at 2642. That such privacy interests are diminished does not mean they are eliminated. *Grigoleit v. Board of Trustees*, 233 Ill. App. 3d 606, 599 N.E.2d 51 (4th Dist. 1992), does not alter this conclusion, nor did the court there consider a situation in which the samples were obtained from the defendant's own property. The defendants here had a sufficient expectation of privacy to trigger the protection of the Fourth Amendment. As to the individual defendants, Porcelli and Patel, the State seems to seek to limit their privacy

rights to matters personal to them. The State has cited and the court has discovered no authority for this proposition. The requisite possessory interest has been demonstrated so as to entitle them to Fourth Amendment protection as well.

The court finds no support in the record for the State's contention that the defendants "consented," expressly or impliedly, to the MWRD's warrantless incursions and carefully concealed evidence-gathering operation. The court is unaware of any authority requiring an "objection" before the search warrant requirement comes into play, nor has any been cited. The evidence in the record of the lengths to which Waclawik went to conceal his activities and his true purpose on the premises preclude any finding of a consent by any of the defendants to a search of which they were unaware.

The MWRD's characterization of the "inspections" here as "routine" notwithstanding, the only conclusion supported by the record is that MWRD, acting on a tip of illegal waste disposal, determined to undertake a criminal investigation on its own. It is well-settled that units of government may not use their administrative authority to circumscribe the protections afforded the objects of criminal investigation. "One of the fundamental principles of administrative searches is that the government may not use an administrative inspection scheme as a pretext to search for evidence of criminal violations." *People v. Madison*, 121 Ill. 2d at 209. The court finds that none of the exceptions to the warrant requirement are applicable here. The evidence which is the fruit of the warrantless search and seizure conducted by the MWRD must, therefore, be suppressed.

WHEREFORE, Defendant's Motion to Suppress is granted.

ENTER: _____
Hon. Eugene Campion

DATE: February 23, 1996

(*Letterhead of*)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

December 3, 1997

Mr. W. Scott Nehs
Wildman, Harrold, Allen & Dixon
225 West Wacker Drive
Suite 3000
Chicago, IL 60606-1229

No. 83942 – People State of Illinois, respondent, v. Electronic Plating Company et al., petitioners. Leave to appeal, Appellate Court, First District.

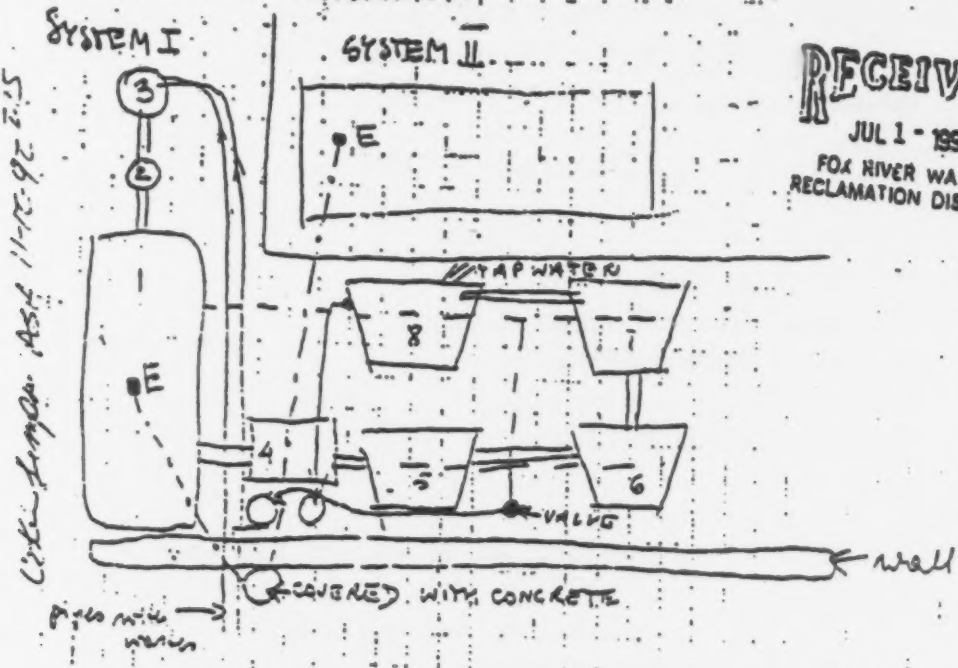
The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 26, 1997.

9254.7586

FROM ~~ATTN~~: RICK MANNER, FRWD Fm 10 708 742 0193

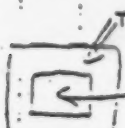
RECEIVED
JUL 1 - 1992
FOX RIVER WATER
RECLAMATION DISTRIC



E - HIDDEN ELECTRIC VALVE ON THE BOTTOM OF TANKS

-·-·- PIPES WITH WASTES, WHICH ARE UNDERGROUND (INVISIBLE)
- - - PIPES UNDER TANKS (VISIBLE)
═══ "NORMAL" PIPES

B - ELECTRIC BASE WITH SWITCH FOR HIDDEN ELECTRIC VALVES ON THE SIDE.



TANK # 8 VIEW FROM THE TOP

312 - 751 - 5048

Thank you.
James M. MacBeath
COMPLAINANT

Exhibit A

BEST AVAILABLE COPY